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In the Supreme Court

of the United States

OCTOBER TERM, 1988

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; NATURAL RESOURCES DEFENSE COUNCIL, INC.; et al.,

Petitioners,

v.

JAMES M. LOVE, et al.,

DAVE FROHNMAYER, Attorney General for the State of Oregon,

and

JOHN A. MOORE, Acting Administrator, United States Environmental Protection Agency,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Does Section 6(c) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 USC § 136d(c), create jurisdiction in the district courts on an action brought by interested parties to enjoin an emergency suspension order?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. The Facts 1

B. The Proceedings in the District Court . . 5

C. The Proceedings in the Court of Appeals . . 7

REASONS WHY THE WRIT SHOULD BE DEMIED 9

A. Statutory Scheme . . 14

B. Statutory Structure and Purpose 18

C. Statutory Language . 23

CONCLUSION 29

TABLE OF CASES AND AUTHORITIES

Cases

	Page
Block v. Community Nutrition Inst., 467 US 340, 104 S Ct 2450, 81 L Ed 2d 270 (1984)	12
Dow Chemical Company v. Blum, 469 F Supp 892, 902 (ED Mich 1979)	6,14,21
Fiedler v. Clark 714 F2d 77 (9th Cir 1983) . .	9
Fuentes v. Shevin, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972), reh'g denied 409 US 902, 93 S Ct 177, 34 L Ed 2d 165 (1972)	13
In the Matter of Cedar Chemical Company, et al. v. U.S. Environmental Protection Agency, FIFRA Docket Nos. 590, et seq. (1988)	4-5
Northwest Food Processors Association v. Reilly 9th Cir Ct of Aps 88-4339; 88-4389	29

Statutes, Rules, and Regulations

Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 USC § 136(d), et seq. 2,5,17 20,24,26,27

§ 6(c), 7 USC § 136d(c) . . . 1,2
§ 6(c)(2), 7 USC § 136d(c)(2) 5,13,15 16,24,25
§ 6(c)(3), 7 USC § 136d(c)(3) 2,15,17 21
§ 6(c)(4), 7 USC § 136d(c)(4) 5,12,13 17,18,20 23,26,27

7 USC § 136n(b) 15

40 CFR § 164.120(a),(b) 2
40 CFR § 164.130-133 3,4
51 Fed Reg 36634, 36635 1,2
52 Fed Reg 11119 4

Rules of the Supreme Court of the United States
Rule 17.1(a) 27

Other Authorities

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit passim

Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit . . . . . passim

OPINIONS BELOW

Petitioner's statement is acceptable.

JURISDICTION

Petitioner's statement is acceptable.

STATUTES INVOLVED

Petitioner's statement is acceptable.

STATEMENT OF THE CASE

A. The Facts. Without prior notice, the EPA issued on October 7, 1986 an emergency suspension order for the registered pesticide dinoseb. The order required an immediate cessation of the use, transfer, and sale of dinoseb pending administrative proceedings to determine whether the pesticide posed a significant threat to human health and the environment. See 51 Fed Reg 36,634, 36,635 (1986).

The EPA was acting under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") which provides for the regulation of pesticide use in the United States. 7 USC § 136d(c).

Under FIFRA, pesticides may not be sold or distributed unless registered with the EPA. Registrants, who generally are manufacturers and users, must show that the product will not cause unreasonable adverse effects on the environment.

Pursuant to FIFRA, the EPA mailed copies of the emergency suspension order, already in effect, to registrants along with a notice of intent to permanently cancel all registrations. 40 CFR § 164.120(a), (b) (1988). Appendix to Petition. ("App" 55a). Post-order notification was also published in the Federal Register, informing registrants of their right to file for an expedited hearing to determine whether an imminent hazard existed.[1] 51 Fed Reg 36,634; 7 USC § 136d(c)(1).

Six registrants requested cancellation hearings pursuant to § 6(c)(2) of FIFRA. Four registrants

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[1] No notice was given that other interested persons might file briefs and participate in a judicial appeal. 7 USC § 136d(c)(3). App 15a.

contested the emergency suspension order by requesting an expedited hearing which began on October 20, 1986. Ten days into the hearing, the registrants withdrew their requests and the hearing was terminated. No explanation for the termination is cited in the record. (App 5a.) The EPA then entered a final suspension order continuing the ban and on November 26, 1986 the docket in the expedited hearing was closed. (App 52a.)

The American Dry Peas and Lentil Association petitioned the EPA for a hearing under 40 CFR § 164.130-133 to reconsider and modify the emergency suspension order. The Association sought modification to permit the use of dinoseb on dry peas, lentils, and chick peas under certain conditions. The EPA approved a recommendation of the Administrative Law Judge to allow the application of dinoseb on these crops on March 30, 1987. (App 53a.)

Two days later, however, the EPA denied a petition to reconsider the use of dinoseb on green peas and snap

beans.[2] The latter petition was submitted by the Northwest Food Processors Association ("NWFPA") on the basis that there would be significant crop and financial losses if the order were not modified. The EPA ruled that petitioner had presented no substantially new evidence, so that no hearing was required and the decision was final. 52 Fed Reg 11,119 (1987). 40 CFR § 164.131(b).

Two registrants continued to contest the final cancellation order in the Agency proceeding. On June 10, 1988, however, these registrants entered into a settlement agreement with the Administrator which provided for the sale and distribution of existing stock for use for 1988 to 1989, and for the final cancellation of the registration. See In the Matter of Cedar Chemical Company v. U.S. Environmental Protection Agency,

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[2] Chick peas and lentils are often grown in adjoining fields with green peas. Dry peas and green peas are essentially the same crop. (App 63a.)

FIFRA Docket Nos. 590, et seq., Cancellation Order and EPA Rationale for Settlement. Non-registrants were not parties to the settlement agreement.

B. The Proceedings in the District Court. Two days after EPA denied reconsideration, the NWFPA filed for a preliminary injunction in district court under Section 6(c)(4) of FIFRA.[3] The district court granted immediate review of the emergency suspension order, based on 7 USC § 136d(c)(4), and § 136d(c)(2).[4] (App 54a.) Concerning jurisdiction, the district court held

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[3] "Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law." 7 USC § 136d(c)(4).

[4] The injunction permitted the use of dinoseb under prescribed conditions designed to protect applicators; there is no risk to consumers. 69a-71a; 7a n. 8.

that once the registrants had requested a hearing, this vested a right in others to seek district court review. That right of review was not divested by the registrants' termination of the hearing.

Following trial, the court preliminarily enjoined enforcement of EPA's emergency suspension order for dinoseb pending the completion of the EPA's cancellation proceeding. The district court also held that the actions of the EPA were arbitrary and capricious due to errors and omissions of the EPA. (App 64a.) The court found in particular that EPA had not considered the relevant factors in weighing risks and benefits. See Dow Chemical Co. v. Blum, 459 F Supp 892, 902 (ED Mich 1979). (App. 58a-App 62a.) EPA had instead analyzed the impact of the ban on the Northwest in a cursory, unacceptable fashion. (App 56a, 59a.) "What data it did use in analyzing dinoseb sites in the Northwest was scanty, and inconsistent with or contradicted by data readily available

to, but not considered by, the EPA." (App 60a.)

> "In particular, the EPA did not determine the efficacy of alternative pesticides it proposed to substitute for dinoseb in the northwest. Consequently, the estimated financial impact to the northwest could not be determined accurately in weighing risks versus benefits."

(App 60a.)

C. The Proceedings in the Court of Appeals. The Ninth Circuit affirmed that the EPA was arbitrary and capricious in issuing its emergency suspension. (App 31a, 34a.) The Ninth Circuit also affirmed jurisdiction in the district court, albeit on different grounds. Applying traditional rules of statutory interpretation and relying upon the long recognized presumption in favor of judicial review of administrative actions, the court held that an emergency suspension is judicially reviewable at the behest of a nonregistrant, whether or not a

registrant has first timely requested administrative review. (App 11a-16a.)

On the merits, the Ninth Circuit detailed EPA's failure to take into account economic, social, and environmental costs and benefits of the use of any pesticide before issuing a suspension order. (App 19a.) The Ninth Circuit also detailed EPA's recommended use of paraquat, a banned herbicide, and the lack of consideration given to the Northwest's unique problems with deadly nightshade. The court also found no genuine emergency to justify immediate suspension of dinoseb. (App 30a.) While EPA cited the fall potato crop of 1986 as the principal emergency, that crop had already been treated by the time the suspension order was issued on October 14, 1986. (App 3a.)

While the Ninth Circuit emphasized that the economic circumstances of every affected region need not be considered when human health is truly imminently threatened, the facts showed both no emergency and failure by

EPA to weigh risks and benefits. (App 43a-44a.) EPA's declaration of a public emergency when none existed nearly subjected Northwest agriculture and related enterprises to economic disaster. A timely injunction averted the harm.

REASONS WHY THE WRIT SHOULD BE DENIED

A threshold reason for denying certiorari is petitioners' lack of standing. The petitioners are all private entities or individuals. The EPA has not petitioned for certiorari. FIFRA neither permits citizen suits nor private attorney general actions brought on behalf of citizens. Fiedler v. Clark, 714 F2d 77 (9th Cir 1983). Additionally, none of these private entities or individuals has shown itself or him or herself to be within the class of persons which surrogate studies suggested might be at risk. It was undisputed that dinoseb is not hazardous to consumers. (CR 59, 162.) Moreover, while potential exposure of agricultural workers during reentry of fields treated with dinoseb was identified by the EPA as "a concern"

in its suspension decision, there was no objective finding of threatened or actual harm to such workers. It was instead findings of possible risk to applicators, based on surrogate studies, which EPA relied upon in ordering emergency suspension.

Intervenors' affidavits in support of their motion for intervention identify them (with three exceptions) as being or as representing persons other than chemical applicators. All but one of the individual intervenors state an interest only as harvesters.[5] Two of the four institutional intervenors also claim no interest on behalf of applicators. The AFL-CIO bases its standing on inclusion of "*** members who are exposed to dinoseb in its manufacture, processing, distribution, transport, sale

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[5] Intervenors Christina and Maria Esquivel, Alicia Prieto, Aurora Leon, Constancio Martinez, Enrique Prieto, Antonio Leon, Juan Prieto, and Juan Prieto, Jr., each testified to working in fruit or vegetable harvests. (Memorandum in Support of Motion to Intervene.)

and use, and potentially, through food." (Memorandum in Support of Intervention at 6 n.3.) The Natural Resources Defense Council (NRDC) bases its standing on "*** members *** exposed to dinoseb in their drinking water and food and which *** has an institutional and membership interest in protecting wildlife." (Id.)

It bears repeating that the EPA's suspension order was keyed to agency belief in studies suggesting harm to applicators. Of the three intervenors claiming an interest as applicators, intervenor Diana Guzman reports that "I have worked spraying pesticides in the past, though I was not told the names of the pesticides." (Motion for Intervention.) For the United Farmworkers of Washington, affiant Tomas Villanueva states: "Some of our members are also pesticide applicators in these crops." (Id.) For the Pineros y Campisenos Unidos del Noroeste, Inc., (PCUN), affiant Cipriano Ferrell declares that: "Within our membership we have individuals who have applied pesticides

to one or more of the covered crops." (Id.) No affiant has shown that he or she currently is licensed as a certified pesticide applicator.

Assuming for argument that petitioners have standing, their petition does not warrant grant of certiorari. In summary, petitioners seek to limit non-registrants' right to judicial review of emergency orders. Petitioners contend that review would deter the EPA from acting in emergencies.

In their push for plenary power for the EPA, petitioners contradict the express language of the statute, prior case law, and fundamental constitutional principles. FIFRA explicitly provides for judicial review to guard against abuse of discretion. 7 USC § 136d(c)(4). There is also a presumption, inherent in our system of checks and balances, which favors judicial review for administrative action. Block v. Community Nutrition Institute, 467 US 340, 350-51 104 S Ct 2450, 81 L Ed 2d 270 (1984); Dreyer v. Illinois, 187 US 71, 23 S Ct 28, 47 L Ed

79 (1902). Furthermore, the scheme the legislature has chosen, as construed by the Ninth Circuit, is consistent with basic principles of fundamental fairness and due process of law. Fuentes v. Shevin, 407 US 67, 92 S Ct 1983, 32 L Ed 2d 556 (1972).

While only administrative review is available for non-emergency orders, such orders cannot issue absent notice to registrants. 7 USC § 136d(c)(2). Emergency orders, by comparison, issue without prior notice of any kind. It is the lack of opportunity to be heard before issuance and lack of immediate effective notice which gives interested parties (with the concurrence of a registrant) the right to immediate district court review. 7 USC § 136d(C)(4). District Court review also precludes any question of a taking without due process that could arise if review were not allowed.

Petitioners insist that judicial review deters the EPA from acting decisively to protect public

health. (Petition, p 26.) Petitioners fail to recognize that the power to grant emergency suspension orders remains intact. All that EPA loses is the ability to act capriciously. Judicial review assures that the EPA will act with "minimal standards of rationality." Dow Chemical Co. v. Blum, 469 F Supp at 903.

Petitioners' assertion that emergency orders will be vulnerable assumes that EPA will not meet this minimum standard of rationality when it acts. Judicial review, however, may serve equally to validate an emergency suspension order when rational action is shown.

The Ninth Circuit's interpretation is not in conflict with other circuit courts. The Ninth Circuit's opinion is also consistent with general principles of law.

A. Statutory Scheme. FIFRA provides the EPA with three principal procedures to ban pesticides which present a threat to human health and the environment.

First, the EPA Administrator may give notice of intent to cancel the registration of a pesticide when there is a substantial question about the safety of the registered pesticide. Registrants receive prior notice of the proposed cancellation and may request a hearing to determine the sufficiency of the safety question before the cancellation takes place. Cancellation hearings may take two or more years to complete. Orders are reviewable by a court of appeals. 7 USC § 136n(b).

Second, if the Administrator determines that the pesticide presents an imminent hazard, the registration may be suspended pending the outcome of the cancellation proceedings. Except in emergency situations, the Administrator may not issue a suspension order until the registrants have been notified of the intended cancellation and of the findings in support of the considered imminent hazard. 7 USC § 136d(c)(2). Suspension orders issued after a hearing are also reviewable in a court of appeals. 7 USC

§ 136n(b). When notice of intent to suspend is issued the registrants must be given an opportunity to request an expedited hearing on whether an imminent hazard is present. The registrant has five days after the receipt of the notice to request the hearing. Following a request for hearing, the suspension is automatically stayed until after the matter both has been heard by an Administrative Law Judge and the Administrator has issued a final order after reviewing the law judge's findings. If no request for a hearing is made within five days of the registrants' receipt of the notice, the suspension order may issue and will not be judicially reviewable. 7 USC § 136d(c)(2).

Third and finally, in extraordinary circumstances, the EPA may issue without notice an emergency suspension order. 7 USC § 136d(c)(3). Such an order goes into effect immediately and remains in effect pending the result of an expedited hearing. 7

USC § 136d(c)(3). Only registrants may request and participate in the hearing although any person adversely affected may file a brief and become a party for purposes of review. 7 USC 136d(c)(3). Once an emergency suspension order has been entered, it is subject to immediate review in an action brought in district court by the registrant or other interested persons with the concurrence of the registrant.[6] 7 USC § 136d(c)(4).

The statutory scheme plainly allows for two lines of review, judicial and administrative. The statute provides access to both processes for registrants and non-registrants (with the concurrence of registrants) with varying degrees of participation according to their interests and to the type of suspension order at issue. 7 USC § 136d(c)(3). Section 4 specifically allows judicial review before cancellation proceedings

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[6] Petitioners contend that district court review should become available only after a complete administrative hearing on the propriety of the underlying suspension. (Petition, p. 15.)

have been completed. It further provides review to occur simultaneously with other administrative review proceedings provided for under § 6(c). 7 USC § 136(d)(c)(4). The provision that an emergency suspension order is subject to immediate review before the completion of any administrative review is entirely consistent with the procedural scheme of Section 4.

B. Statutory Structure and Purpose. There is no dispute that FIFRA delegates executive power to the EPA to protect public safety through the regulation of pesticides. The issue is whether the legislature intended to provide judicial review of emergency suspension orders in actions brought by non-registrants. Petitioners' contention that the agency is the only body with the proper expertise to review these technical matters ignores the question of legislative intent.

The lack of notice and immediate effect of emergency orders may reasonably result in the right of

judicial review to a broader group of interested parties. The rights of review that apply to emergency orders are not dependent upon the rights that apply to ordinary suspension orders which are issued only after notice and an opportunity to be heard is given to those that the legislature has determined have the greatest interest in the suspension.

The right to judicial review is not extinguished for registrants when no request for an expedited hearing is made. The extraordinary act of emergency suspension merits access to direct judicial review in the eyes of the legislature.[7] The exhaustion of

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[7] The Ninth Circuit explained:

> "FIFRA, however, provides for the issuance of a final suspension order only in those cases where there is an administrative hearing. There is no provision for entering a separate final suspension order if no hearing is held after issuance of an emergency order, and none in fact was entered in this case. The EPA invites us to create a procedural fiction

administrative remedies is specifically not required on the face of the statute. FIFRA § 6(c)(4), 7 USC § 136d(c)(4).

Petitioners present the extraordinary notion that there is an "evident [legislative] intent to preclude non-registrants from interfering with the short-term suspension of a pesticide." (Petition, p 19.) Petitioners may be correct in stating that non-registrants are restricted from access to administrative review of suspension orders due to the short duration of the orders and the burden on the agency in conducting hearings. Id. at 18. However, the express provision for

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to the effect that a final suspension order follows an emergency order whenever a hearing is waived. We see no reason for doing so. As we read the statute, when no hearing is held, the emergency suspension order simply stays in effect until the cancellation or classification proceedings are completed, or, as in this case, until stayed by the district court." (App 13a.)

judicial review of emergency orders by non-registrants eases the administrative burden, provides for checks and balances, and guards against agency abuse of discretion. The statute is not designed to preclude non-registrants from asserting their express rights as interested parties.

Petitioners' advocacy of plenary power for the EPA to both declare and adjudicate whether an emergency exists is inconsistent with case law and the language of the statute. 7 USC § 136d(c)(3), and (4); see Dow Chemical Co. v. Blum, 469 F Supp at 902. Petitioners presume that a registrant's failure to proceed with an expedited hearing can only be based on a belief the registrant cannot prevail.

Finally, petitioners consider this case to be one which supports "foreclosing hasty judicial review" for emergency suspension orders. (Petition, p 20.) Petitioners assert that the Court of Appeals did not question the Administrator's conclusion as to the

hazard presented by dinoseb. Id. The Court, however, clearly did not find any imminent threat and did find the record failed to show any "particularly compelling circumstances requiring the EPA's haste." (App 30a.)

The Ninth Circuit re-emphasized the circumstances of this case in its Amended Opinion:

> "Our conclusion in this regard is based on the circumstances of this case. Our holding should not be interpreted as suggesting that where human health is imminently threatened, the EPA may not lawfully issue an emergency suspension before considering the economic circumstances of every affected region. In this case, however, at the time the EPA entered its order, the agency had already received substantial information regarding a potentially disastrous and unique economic impact of its contemplated action on one affected geographic area. It issued the emergency suspension order without evaluating that impact, and then failed to use available time after entry of the order and before advent of the spring use season to

> evaluate the risks and benefits in the Pacific Northwest. Under those circumstances, the EPA acted arbitrarily and capriciously." (App 43a-44a.)

C. Statutory Language. The express language of the statute supports the Ninth Circuit's holding that a district court has jurisdiction to review an emergency suspension order brought in an action by a non-registrant. Petitioners ignore the plain, though ungainly, language of Section 6(c)(4). This section states: "Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court ***." 7 USC § 136d(c)(4) (emphasis added).

The conclusion reached by the Ninth Circuit is inescapable when the critical sentence in Section 4 is parsed. The phrase "Any order of suspension entered prior to a hearing" can only refer to an emergency suspension order.

An ordinary suspension order is not entered "prior to a hearing." A notice is issued prior to a hearing for ordinary suspension. If no request for a hearing is received, then the suspension order is issued, but pursuant to Section 6(c)(2), the suspension order is not reviewable by a court.[8] 7 USC § 136d(c)(2). Therefore, immediate review in district court is available for emergency suspension orders in actions brought by the registrant or other interested persons. (App 13a.)

Petitioners contend that Section 2 precludes judicial review of an emergency suspension hearing in the absence of a timely request for an expedited hearing. Section 2, however,

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[8] The Ninth Circuit summarized:

> "Since ordinary orders entered after waiver of a hearing are made unreviewable under subsection (c)(2), subsection (c)(4) must authorize district courts to review emergency suspension orders, if it is to have any meaning at all." (App 12a.)

immediately follows and refers to the section on ordinary suspension orders. Section 2 states that if there is no request for an expedited hearing within five days of the registrant's receipt of notification, then the suspension order may be issued and shall take effect. Furthermore, the order shall not be reviewable by a court. 7 USC § 136d(c)(2).

The five-day provision clearly cannot refer to an emergency suspension order for two reasons. First, receipt of notification occurs after the issuance of an emergency suspension order, not before as this section contemplates. Second, an emergency order becomes effective immediately, prior to a request for a hearing, not afterwards, as is contemplated here.

Petitioners' interpretation of this sentence is as implausible as it is incomprehensible. The suggestion is that the three clauses, "shall issue," "shall take effect" and "shall not be reviewable," which are joined

conjunctively, should be read so as to make two clauses inapplicable and one clause applicable to FIFRA § 6(c)(3). (Petition, p 23.)

The statute provides that an emergency suspension order shall be "subject to immediate review." § 6(c)(4), 7 USC § 136d(c)(4). The Ninth Circuit found that NWPFA's suit was timely in that the non-registrants filed immediately after they had received a denial from the EPA on their motion to reconsider the suspension. Petitioners, however, contend that because the non-registrants filed in district court several months after the order was actually imposed, the suit is not timely. Clearly, the NWFPA filed immediately after exhausting their own administrative remedies.

The context of the section makes the meaning of the phrase "subject to immediate review" quite clear. It does not mean that "review must be 'immediate.'" (Petition, p 21.) The previous sentence provides that review

may be sought even if cancellation proceedings have not been completed. FIFRA § 6(c)(4), 7 USC § 136d(c)(4). The following sentences provide that judicial review may be sought simultaneously with expedited hearings, and that judicial review shall not operate as a stay. Id. The legislative intent was clearly to allow a suit to be filed in district court to enjoin emergency suspension orders notwithstanding ongoing related administrative proceedings.

The Ninth Circuit has not rendered a decision in conflict with any decision of another federal court of appeals on the same matter. SCR 17.1.(a). The Ninth Circuit has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court so as to call for an exercise of this Court's power of supervision. SCR 17.1.(a). The Ninth Circuit followed established judicial principles by looking to the plain meaning of the statute, construing the statute to avoid

redundancy, surplusage or constitutional conflict, and by adhering to the established principle of providing for judicial review of administrative action. Petitioners merely advocate plenary power to the EPA. There is simply no conflict in the law that makes this case appropriate for granting a writ of certiorari.

The statutory construction rendered by the Ninth Circuit does not leave the intent and meaning of the statute in a state of confusion so as to require further clarification by this Court. Furthermore, the argument that the Ninth Circuit's decision unreasonably restricts the Agency's ability to issue emergency suspensions was specifically addressed in its amended opinion. That amendment resolves whatever doubts may linger as to whether the Ninth Circuit's ruling in any way inhibits the EPA's power to protect human health in a true emergency.

CONCLUSION

For the reasons stated above, this Court should deny certiorari.*

Respectfully submitted,

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* While on March 20, 1989 the Ninth Circuit sustained EPA cancellation of dinoseb pursuant to a settlement, Northwest Food Processors Association v. Reilly, 9th Cir Ct of Aps 88-4339, 88-4389, that ruling has no effect on the reviewability of the emergency suspension order.